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COMING TO THE END

Mandatory Retirement in Saskatchewan

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I The Legal Context

It needs to be said at the outset that it is universally accepted that mandatory retirement regimes that require employees to retire at some prescribed point, usually following an employee's 65th birthday, operate to exclude persons from jobs on a basis other than ability to perform the work. There is simply no general claim of a correlation between age 65 and employment capacity. Usually, exclusion of persons from almost any form of social participation, especially employment, on bases other than capacity (for instance, their ability to meet specific occupational requirements) is considered discrimination.[1] In Canada, acts of employment discrimination are subject to federal and provincial human rights legislation that is designed to place liability on those who are responsible for discriminatory acts – a duty to restore persons to positions that they might hold if there had not been an act of discrimination and liability for monetary damages for the harm of discrimination.

In Saskatchewan, however, human rights legislation specifically withdraws protection against age discrimination from all those who are older than the age of sixty-four years.[2] This legislative gap in protection is present in only one other Canadian jurisdiction[3] – British Columbia – and in B.C. the legislature has begun legislative debate on ending mandatory retirement.[4] Canada's other twelve jurisdictions do not employ this form of legislative limit. However, the almost universal repeal of an age limit on protection from discrimination does not mean that there are only two jurisdictions in which mandatory retirement is allowed. Some jurisdictions – Canada, Nova Scotia, New Brunswick and Manitoba – while removing the age restriction in their human rights acts have legislated varying degrees of immunity for mandatory retirement plans.[5]

Saskatchewan's statutory limit on age discrimination protection is under challenge in a human rights complaint that is now before a Human Rights Tribunal.[6] The case involves the imposition of mandatory retirement by a municipal public library on a reference librarian, an occupation, one might have thought, that benefited from experience. At first blush, it would seem that the complainant could have no case before the Tribunal since she falls outside the range of persons protected from age discrimination under The Saskatchewan Human Rights Code. However, Supreme Court of Canada decisions have made it clear that if statutory human rights regimes fail to protect classes of persons, or fail to protect against some types of discrimination, these failures can constitute a denial of equality under the Constitution,[7] and reviewing courts can order that the legislative gap be filled.[8] More pertinently, the Supreme Court has also decided that statutory tribunals, such as Saskatchewan's Human Rights Tribunal, are empowered under the Constitution to make decisions that will nullify any Charter violating provisions in the legislation that they are charged with interpreting and applying.[9]

Notwithstanding the clear authority of tribunals to correct legislative lapses in anti-discrimination legislation, such as the failure to protect those over 64, and the seemingly clear case of the discriminatory effect of excluding persons from work without regard to their capacity to perform

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employment responsibilities, a decision from the Tribunal declaring mandatory retirement to be unconstitutional is far from certain. This is because in the leading case on the constitutional validity of mandatory retirement, *McKinney v. University of Guelph*,[10] a majority of the Supreme Court of Canada held that mandatory retirement was allowable under the provision of the Charter that allows a "reasonable" limitation on the constitutional right not to be discriminated against. Interestingly, that conclusion was reached after the majority had determined that since university administration and rules are not governmental acts they were not subject to the Charter's provisions.[11] Although this conclusion was, in itself, sufficient to dispose of the challenge, every member of the Court went on to find that mandatory retirement contravened the Charter right to equality through inflicting discrimination on the basis of age. A majority of the Court, however, then concluded that, under the reasonable limits exemption contained in section 1 of the Charter, the university's mandatory retirement policy was an allowable breach of the right to equality on the ground of compelling social justifications.[12]

The university had advanced two justifications for its rule. First, it said, mandatory retirement is needed "to enhance and maintain its scholarly capacity to seek and maintain excellence by permitting flexibility in resource allocation and faculty renewal." It also argued that mandatory retirement preserved "academic freedom and the collegial form of association by minimizing … performance evaluation." The Court majority accepted the university's justifications notwithstanding the obvious rebuttals that discriminatory practices always enhance managerial prerogatives (especially prerogatives that flow from claims for flexibility and renewal) but this hardly justifies these practices. Second, nowhere has the ending of mandatory retirement led to abolition of tenure or the abandonment of academic freedom.[13] Furthermore, judicial acceptance of these justifications exacerbated the discriminatory effect of mandatory retirement. The justifications, in essence, claim that older faculty members cannot stay abreast of developments in their disciplines[14] and that older faculty cannot withstand the perfectly commonplace performance reviews that, at decent universities, take place regularly for all faculty members.[15] La Forest J. noted that accepting the university's justifications was a matter of "striking a balancing between claims of competing groups." In a startling adoption of a majoritarian conception of rights, as well as a non-principled resort to judicial deference, he concluded: "Democratic institutions are meant to let us all share in the responsibility of these difficult choices. As courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function." He does not explain his perverse preference for subjecting the interests of vulnerable minorities to the will of the majority.

Although the *McKinney* decision is not the Court's finest moment, it has been followed. In *Dickason v. University of Alberta*,[16] the Supreme Court held, simply by adopting *McKinney*, that the university was able to meet the provision in Alberta's human rights legislation that allowed contraventions so long as they were shown to be "reasonable and justifiable in the circumstances." In this case, however, the majority was thinner with four judges relying on *McKinney* while three dissented. Two of them, L'Heureux-Dubé and McLachlin JJ., strongly rejected every element of the justificatory analysis in *McKinney*.[17]

If the Human Rights Tribunal (or the courts to which there is likely to be an appeal) were to strike out the limitation with respect to age discrimination, or if the Saskatchewan legislature were simply to repeal the exemption from protection from age discrimination for those 65 years and older (as well as remove from its legislation the provision immunizing retirement plans from complaints), this would not necessarily mean that there could never be an age based retirement regime. The Saskatchewan Human Rights Code removes the liability for discrimination when a specific gender, ability or age can be demonstrated to be a "reasonable occupational qualification and requirement for the position or employment."[18] This exemption is not, however, nearly as broad as the compelling social purpose test under section 1 of the Charter, and it is likely impossible to show a tight enough correlation between being a certain age and having the capacity to continue effective employment,[19] It is not that age can never be a rough surrogate for capacity. For instance, in the regulation of youth with respect to driving, voting, sexual relations and drinking, age may be closely enough related to mature judgment and emotional capacity. Likewise, such a correlation may be closely enough established at an age significantly higher than 65, although one suspects that it will seldom be easy to find social consent for the use of any age based criterion with respect to largely intellectual or mental functions. On the other hand it has been possible to establish a correlation between the age of an employee and qualifications relating to strength and endurance.[20] The important point however is that the sort of general social trade-offs that were utilized in the *McKinney* case cannot

be used to demonstrate that age is a reasonable occupational qualification since age, generally, is so inexactly related to employment capacity.

II The Social Context

Adopted as an element of the emerging activist state, out of efforts by workers and unions to secure progressive labour agreements, mandatory retirement was originally meant to relieve the burden on the labour force of life-long toil. Unions fought so that workers could spend their elderly years in leisure rather than in unceasing employment. In an economy that often involved physically taxing and monotonous employment, workers were often unable and unwilling to work past their mid-sixties. The coming of mandatory retirement policies corresponded with significant gains by older Canadians in the struggle to receive enough compensation from government to secure a minimal living standard after retirement. The first old age pension began in 1925, only available "if the Canadian citizen passed a strict and demeaning means test."[21] Such an arrangement lasted until 1951, when the federal government introduced the Old Age Security Act, meant to assist citizens over 70. It was accompanied by the Old Age Assistance Act, which provided help to Canadians from 65-69. In 1965, the Canadian Pension Plan was introduced for those under 65. The age of 65 remained, until fairly recently, the standard age of retirement in Canada.

That there has now been a significant shift in the moral evaluation of mandatory retirement is beyond question. Most Canadian jurisdictions have eradicated, restricted or conditioned the use of mandatory retirement. Simply because of the size of Ontario's population the most significant break from the norm of mandatory retirement tradition came with Ontario's enactment of the end of legislative protection for mandatory retirement. This amendment will come into force later this year. Behind these legislative changes are several causes. As we discuss later, some view the end of mandatory retirement to be the clever scheme of owners, managers and governments to reduce pension liability and to compensate for a declining labour force. It is never wise to discount economic imperatives and, indeed, there are economic and social concerns over the shrinking labour pool, as well as over the higher proportion of persons who are social security (and health care) beneficiaries and the lower proportion who are salaried taxpayers.

Perhaps equally significant to the cultural shift over retirement are two other factors. The first is the constant increase in the centrality of self-determination in our understanding of citizenship. In liberal democratic societies we have moved a long way from accepting the primacy of fixed social expectations and the suppression of personal freedom in order to sustain the good and stable society (although this is an unstable political phenomenon and there are constant calls to return to those social norms that produce social and moral homogeneity). Holding to traditional views on marriage, sexuality, religious observance, women's roles, culture, voluntarism, political legitimacy and employment is no longer the source of our social cohesion; in these matters we place personal liberty above maintaining norms. From this perspective, mandatory retirement might appear to be just another dated social structure that arguably serves general interests of the sort that has persuaded the Supreme Court of Canada (as well as some university administrators[22]) but are generally seen as robbing individuals of the right to make choices that are central to their lives.

Perhaps an even more significant cause in the erosion of support for mandatory retirement is the force of the claim of an irrational connection between the traditional retirement age and capacity. Specifically, our understanding of aging – and our actual experience with people in their sixties, and older – tell us that very many (indeed, most) people remain physically and intellectually vigorous long after the traditional retirement age. Mandatory retirement at age 65 is an artifact of another age, and of a different understanding of aging. It should not serve as an organizing idea for a population whose experience with age development is markedly altered.[23]

Notwithstanding this shift, mandatory retirement has its advocates. Some of the justifications for it, however, are simply not compelling. For instance, it is argued that mandatory retirement is an effective way of getting rid of under-performing employees. But, of course, it is neither an effective nor sophisticated way of dealing with under-performance; performance management is the effective way to respond to issues of performance. No well-run enterprise adopts passive policies with respect to any element of productivity or competitiveness. Furthermore, performance management is not the same as "firing" for underperformance. Rather it entails assessing capabilities and, insofar as possible, taking measures to improve capacity and adjusting work responsibilities to produce a strong fit between the employee and work requirements, a process that may be especially attractive to older employees.

Another argument, similar to the reasoning in *McKinney*, is that mandatory retirement spares older workers the humiliation of evaluation, especially negative evaluation[24]. But, most workers go through evaluation constantly (and, formally, on an annual basis) throughout their employment; it is not humiliating.[25] On the contrary it may be a way to let employees make informed judgments with respect to their "final stage of career" plans. In this way it is a process that aids self-determination, not one that robs workers of dignity.

Again, tracking the reasoning in *McKinney*, mandatory retirement is justified on the basis that replacing older with younger workers will improve the quality of the work force because of the higher employment value that arises from new training and new ideas. But, in every efficiency-driven enterprise it is realized that productivity depends on strong practices of life-long learning. It is also denigrating (and wrong) to assume that older workers stop acquiring skills and lose the interest and ability to acquire new skills. It would be economically suicidal to adopt a workforce policy that assumes that workers' abilities will, in the normal course, just slide into obsolescence, and it is not normal management practice. Indeed, it seems likely that mandatory retirement acts as a powerful disincentive to maintaining capacity and acquiring new skills. As has been pointed out choosing how long to remain in the workforce is a key element of personal self-determination, the exercise of which engenders personal choices about how effectively to support that decision and maintain value as an employee. On the other hand, being faced with a forced end to employment negates any sense of responsibility for making that decision work to the advantage of the employer and work colleagues.

Some arguments against the removal of mandatory retirement deserve more attention. For instance, trade unions, most notably CAW and CUPE, argue that removing mandatory retirement will have the effect of pushing older workers into longer work lives.[26] The CUPE website claims that "making it possible to work longer because that is the only way they can survive does nothing to expand workers' options when it comes to retiring." The freedom to work longer simply means that "… workers (including vast numbers of women and immigrants) will never have the option of retiring."[27] CUPE also argues that the call for the end of mandatory retirement stems from the very significant under funding of Canadian corporate pension plans.[28] Those unions that oppose ending mandatory retirement also fear that this will lead to governmental attempts to raise the normal retirement age.[29] Of course, retirement age is largely a function of public and private sector bargaining and is nowhere determined by state regulation (except for non-unionized public sector workers). What CUPE must mean is that once mandatory retirement provisions become unprotected human rights violations, there will be no reason why governmental pensions cannot be delayed for several years in order to reduce pension liabilities. Likewise, CUPE must fear that employers will also force later retirement dates to avoid these liabilities. The assumption is that once mandatory retirement is gone the social norm of a specific retiring age will disappear and this will result in employers being able to bargain for significantly delayed pension eligibility. But it is collective bargaining that defines pension and retirement eligibility and unions are in a position to protect the freedom of workers to leave work when they can and when they want. On the other hand, if there is a weakening of the social norm with respect to retirement, this will indeed create employer driven pressures for delayed eligibility.

Unions argue that a far better alternative for meeting the needs of 65 year olds who face insufficient pensions is to lobby for adequate pensions for all workers at age 65 – either improved governmental pensions or public regulation to ensure more generous private pensions – so that all retired persons can live with dignity. Of course, pensions, whether public or private, do not work independently of the level of employees' and employers' contributions and the unions' hope of a better retirement situation for all workers presents an instrumental challenge (in addition to economic and public finance challenges). The unions' sensible argument is that we shall have a better, fairer society if the social safety net for everyone age 65 or more were stronger. But until that happens (and we need to face the possibility that due to the demographic overloading of older persons in our society this strengthening of elder social security will not likely occur) the union argument precludes those over 64 who face poverty on retirement from continuing their work and, of course, their flow of income. In addition, the assumption that all workers yearn to quit work as early as feasible is wrong. As the *Globe and Mail* has reported[30] there is now no clear pattern of when retirement takes place. This is not evidence of the oppression of workers (although, of course, there are workers who are 65 and older who feel that they have worked long enough but who simply can't afford to quit) but results from many

persons seeking to continue working well past age 65. Work, for many people, is socially rewarding, it is an attractive alternative to the potential emptiness of retirement, it underscores many people's sense of social worth and it provides life-enhancing stimulation.[31] Besides, many people view their work as making a real social contribution – one that can be understood and calculated – and they see no reason why the opportunity to do good through employment, and through using their most developed capacities, should be cut off.

III The Economic Context

It is suggested by some that mandatory retirement makes room in the workforce for younger generations and, thus, avoids the opportunity costs of turning young workers away from participation in the provincial economy. But if this is a social and economic objective that is so pressing why not set limits on years of work – at least that rule, as wasteful of human capital as it would be, would not disadvantage those workers who entered the workforce later in life, such as adult immigrants and persons who assumed family care responsibilities. Apart from the equity deficit in choosing those who turn 65 as the class of employees that should be pushed out of the workforce to make room for younger persons, it is rash for a government to permit the exclusion of older workers (and their accumulated skills) from the provincial workforce on the basis of a replacement strategy that is growing palpably inappropriate.[32] It would be as if a government were to decide that, perhaps, the most crucial factor of provincial economic productivity could be ignored.

The Policy Research Initiative of the Government of Canada puts this productivity issue in the Canadian context: " … compared to other countries, Canada's population is relatively young but the projected increase in the size of the older population over the next 30 years is large.[33] This problem will begin to take shape after 2010, when the age of the population is expected to increase dramatically. The generation born after the end of the Second World War up until the 1960s – the "baby-boom" generation – is disproportionately large and in 2001, made up 47% of the labour force. In a decade, half of them will be over 55 and 18% will be over 60. As Statistics Canada states in their report on the changing profile of Canada's labour force, an "aging workforce is not unique to Canada. What distinguishes Canada is the relatively large size of the baby-boom generation and, therefore, the potential rapid exit of those aging boomers from the labour market."[34] This is coupled with a perpetually shrinking birthrate in Canada. A birthrate of 2.1 children per woman is needed to sustain a population, something Canada has not experienced since the 1970s.[35] Moreover, Canada has experienced significantly expanded life expectancy rates. From 1950 to 2000, life expectancy climbed from 69 years to 79 years. Moreover, in 2001, a 65 year old could expect to live another 19 years, up a year from 1991[36]. The combination of fewer children and more seniors who live longer has led to concerns over the aforementioned labour shortage that could theoretically devastate Canada's productivity.

This situation challenges Canada's social safety net. With so many retirees living longer and with lower birth rates, the Canadian population pyramid will become cylindrical and lead to a rise in dependency ratios – the number of retirees compared to the number of workers. Currently, there are six workers in Canada for every retired person. By 2020, it will be down to three workers for every retiree, and the ratio will sink further without a dramatic increase in immigration. It is safe to say that Canada is on the brink of experiencing a substantial rise of the dependency ratio of seniors. While this is clearly a concern, not all public policy analysts share in a pessimistic prognosis. The Policy Research Initiative believes that there is ample opportunity for a positive response. It says: "It is possible to expect positive impacts from population aging through human capital accumulation.[37] It claims that the most efficient way of generating such productivity is through extension of the labour force's working life: "The conventional wisdom is likely correct. The main gains are likely to come from later retirement, with higher immigration being a possible supporting solution but only in the very long run. We have therefore, concentrated on examining the effects of working longer – the solution indicated by nearly all the recent analyses."[38] To encourage extended working lives it would, of course, be prudent for governments to abolish legislation that impedes this development.

In truth, the simple removal of the statutory protection against age discrimination complaints is not likely to be, in itself, an adequate policy initiative to induce significantly extended stays in the labour force. Kesselman has pointed out while banning mandatory retirement in Canada "… would improve the ability of workers to continue beyond 65, … additional changes would still be needed to encourage all older workers."[39]

In order to minimize the negative effects on the economy of the aging population, some changes will need to be made in both public and private policy arenas. This is because almost all evidence on the impact of ending mandatory retirement suggests that it causes only a minimal extension of employment.[40] It turns out that most workers do not want to work a great deal longer; what they want is the right to decide when they will quit working. One policy change that would delay retirements would be to raise the eligibility age for the Canada Pension Plan. However, it is not within the scope of this paper to propose policy options to improve national productivity through keeping older workers working longer. Indeed, it is contrary to the underlying principle of self-determination to change the rules with respect to pension support on which people have relied in making their retirement plans. The potential labour shortage crisis and the potential fall-off of salary based income tax are detailed in this Briefing Note simply to make the point that the policy imperatives, rather than suggesting that people should leave the work force to make room for younger workers, suggest a need for incentives that cause older workers to stay in employment. However, neither set of imperatives should be used in support of the view that wider social interests justify compelling individuals to work – or to retire.

A further argument that is put forward is that banning mandatory retirement policies will interfere with contract negotiations and make existing pay-scale arrangements inequitable, inefficient and unsustainable. This argument is based on a structure of deferred compensation in which "...a company offers a pattern of wages and pension benefits that underpays its workers during early years, relative to their productivity, and overpays them during later years, relative to their productivity, and … provides incentive for employees to stay with companies for a long time, participate in training, and apply themselves diligently at work."[41] Retirement at age 65 is often part of such arrangements and acts to limit the amount of time that these workers can be overcompensated in relation to their productivity. Supporters of mandatory retirement point out that if it is banned, employers will be forced to overpay workers indefinitely. Gunderson states that "… until the deferred compensation profiles adjust, older workers will receive windfall gains associated with the fact that any wages in excess of their productivity will continue until they retire."[42] Certainly, if a firm's aggregate labour cost is appropriate but younger workers are underpaid while older workers are overpaid then abolishing mandatory retirement will have the tendency to extend this inequity, assuming, that is, there is any significant effect of older workers, on average, staying on the job longer than they would have under the mandatory retirement regime. The answer is to establish salaries that more closely accord with actual productivity. For instance, if productivity increases for ten years and then levels off, stepped salary increases should end after ten years. Universities, for example, use far too many pay steps for actual increases in productivity, and abolishing mandatory retirement in universities should lead to a correction in salary structure. This re-balancing should neither increase nor decrease salary costs nor, in the longer run, lifetime earnings. In fact, the beneficial outcome is that compensation should be pushed up for mid-career faculty members – the pay structure would be shorter and steeper – and in this way income would flow to people in their high cost years. Gunderson, on the other hand, argues that the pattern of over compensation serves a range of positive purposes, "...such as reducing unwanted turnover and shirking, enabling monitoring … and encouraging worker commitment, loyalty and bonding to the company."[43] This analysis has a somewhat antiquarian air; apart from the evident decline in employment stability and employer-employee loyalty, it is doubtful that many workers take account of, or, even, accept the reality of, deferred compensation.

Another source of disquiet over the ending of mandatory retirement is the consequences for the administration of pension plans. There are two sorts of pension plans – defined contribution plans and defined benefit plans. The trend is away from defined benefit to defined contribution plans, although the former class is still by far the larger. Defined contribution plans are not affected by the end of mandatory retirement. The retirement funds in these plans are built up through employer and employee contributions set at a percentage of salary (typically about 5% of salary) and payments to the plan vest in the employee when they are made. So long as an employee is being paid contributions continue to be made. There is no commonly prescribed start day or withdrawals (although most plans require a person to be 55 before starting withdrawals, or before purchasing an annuity with the corpus of the fund, and the Canadian tax authorities require that withdrawals start no later than the end of the year in which a person turns 69). So long as a person works, the retirement fund continues to grow through contributions and, if it makes tax sense for them, employees can also make withdrawals from the fund.

Defined benefit plans are trickier. Under these plans, benefits are not determined by the value of each person's personal fund but by the entitlements defined in the scheme. Normally the determinants of a pension are the accrual rate (which defines for each year of service the percentage of income that will comprise the pension entitlement), the maximum accrual that is allowed (the maximum percentage of earnings available as pension, normally about 70%) and the base for calculating the pension (often the average of the five best years of income). Sometimes, the age at which a person starts a pension will affect the pension but generally age at retirement is immaterial. What is important is what percentage of salary has accrued as pension entitlement by the time a person retires. However, there are complications. Plans are funded on the basis of assumptions about when people are likely to retire and ending mandatory retirement introduces a degree of uncertainty into establishing the size of the general fund. It is clear that this level of uncertainty, added to the uncertainties of both fund performance and mortality, would contribute to the difficulty of planning defined benefit pensions. Further, every time employment is extended beyond the maximum accrual period contributions to the fund stop. This loss in contributions by older employees would, of course, be off-set by the delay in pension pay-outs as employees continue to work. Finally, persons in the two different pension structures would be impacted differently by the ending of mandatory retirement. There would be an incentive on those in defined contribution plans to continue working since they become wealthier each pay period. But those in defined benefit plans who have reached their maximum accrual would be working for 30% of their income since they could receive 70% of their former income as pension (and this calculation is made without consideration of tax implications which would likely add to disincentives to continue work). The bottom line, however, is that the operation of pension schemes does not stand as an impediment to ending mandatory retirement.

IV A Human Perspective

Work can be ennobling or demeaning. It can be the source of mental stability and a sense of moral integrity, or it can corrupt the spirit and stand in the way of all of life's other enriching practices and relationships. One way to generalize about the social and psychological impact of work is that it harms people when it demands too much of them – too much physical exertion, too much tension, too much fear, too many hours, too single-minded a focus – but, also, that people are harmed when they are not allowed to construct their sense of purpose around those endeavours they experience as valuable, and valued. It seems a pity, then, that we are so poor at structuring life cycles and that we require too much work when people are at work and we give too much leisure to people who are no longer allowed to work.

Abolishing mandatory retirement may not, therefore, be just about letting people hold their jobs longer. It is also about letting people have more say in how they organize their work lives so that they fit better the broad range of human needs. In other words, ending mandatory retirement introduces flexibility to the working relationship and, just possibly, that degree of flexibility – that element of self-determination – can be accommodated with respect to more aspects of the employment relationship than just the issue of retirement. Appeals for greater worker flexibility and autonomy are often seen as imposing intolerable costs on managers and owners. Yet, our labour experience has been that flexibility builds stronger workforces, and there are few ideas of employment flexibility that have not been tried and found satisfactory – parental leaves, part-time employment, job-sharing, family crisis days, long shifts, short shifts, work from home, flex hours and phased retirement.[44]

Some might argue that changing needs with respect to worklife can be accommodated well under mandatory retirement because it drives people out of one job, and one job structure, and, in very many cases, into new endeavours and structures. Some of these endeavours are voluntary service, vital to community well-being, and some are new jobs and new business enterprises. The best way to meet changed needs, it is thought, is to force life changes. There are problems with this picture, however. Apart from the predictable problem with telling people what is good for them, there are other concerns. First, many people very much like what they are doing, they do it well, they understand it and they want to continue. Second, the emotional and financial barriers to making a new worklife mean that many retired people do not attempt it. Finally, there is an undoubted productivity loss in driving people away from functions they are experienced at and into new work contexts requiring skills they have not developed.

Perhaps one of the best examples of tying the end of mandatory retirement to a flexible approach with respect to constructing working arrangements that reflect end

of career plans and priorities is found in the agreement between the University of Toronto and the University of Toronto Faculty Association, entered into in 2005, ending mandatory retirement. Under this agreement those turning 65 after July 1, 2005 can choose early retirement without pension penalty at age 60, postponed retirement beyond age 65, with continuing pension accrual, regular retirement at age 65, or phased retirement allowing faculty members to scale down their work load.[45] The plan envisages faculty members, toward the end of their careers, deciding with academic administrators exactly what priority and energy they want to give to their academic endeavours and working out a set of responsibilities that meets university needs and faculty member interests. Academic administrators are not allowed to veto phased retirement proposals but they participate in establishing duties proportionate to the level of appointment reduction chosen by the faculty member.

Equally important, the university agreed to establish Senior Scholar/Retiree Centres to house retired faculty for whom there is no departmental space that will provide offices, intellectual exchange, services to aid scholarly work and support for community outreach.[46] This innovation is not an element of post-65 employment, but represents acknowledgement of the need for diversity in the forms of work engagement for those at, or nearing, the end of their careers. The end of mandatory retirement, the invitation to employees to alter their work responsibilities and the creation of centres that promote a continuing relationship are signs of accommodation of older workers that represents both a deep respect for employees and a commitment to find a structure for mutual benefit.

Of course, not every workplace has the exact capacity for flexibility as a university does but accommodation of diverse employee interests is determined to a considerable degree by state of mind – by a commitment to employee well-being and, by governmentally established norms that express what is owed to those who, through their work, help build a vibrant economy and a good society. Ending mandatory retirement would seem to be a sign of respect for workers – an affirmation of the dignity of work and its importance to the whole community.

BIO

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ENDNOTES

[1] For a clear statement on the discriminatory effect of mandatory retirement, see *Submission of the Ontario Human Rights Commission to the Ministry of Labour Regarding the Consultations on Ending Mandatory Retirement* (September, 2004). See, also, J.Lieper, "Challenging Mandatory Retirement in Academe: A 'Frivolous and Vexatious Complaint'?" in C. Gilllin, D. MacGregor and T. Klassen (eds.), *Times's Up! Mandatory Retirement in Canada* (Toronto: Lorimer, 2005) at 218, for a poignant representation of the double effect of discrimination and denial of due process in fighting mandatory retirement. Professor Lieper's account also describes the added discriminatory effect of mandatory retirement on parents (mostly women) who put aside academic preparation for family responsibilities and, therefore, accumulate low pension entitlements. But, see, S. LaSelva, "Mandatory Retirement: Intergenerational Justice and the Canadian Charter of Rights and Freedoms", (1987) 20 Canadian Journal of Political Science 149. Professor LaSelva denies that mandatory retirement is a denial of equal protection because equality in the Charter embraces intergenerational justice and mandatory retirement is an instrument for realizing that conception of justice. In other words, he raises the interest of younger persons in employment to a competing substantive Charter right.

[2] *The Saskatchewan Human Rights Code*, S.S. 1979, c.S-24.1, s.2(1)(a). In addition, Saskatchewan's human rights legislation clearly excludes anti-discrimination protection with respect to mandatory retirement by providing in s. 16(4) that "No provision of this section [which forbids discrimination with respect to employment or any term of employment on a prohibited ground] relating to age prohibits the operation of any term of a *bona fide* retirement, superannuation or pension plan …." It could be argued that the removal of protection for mandatory retirement would not materially affect the operation of pension plans, but

clearly the end of mandatory retirement would alter the terms of a retirement plan based on termination at age 65. What is clear in the enactment of s.16(4) is that legislators recognized that a retirement plan that calls for retirement at a specific age is discriminatory under s. 16(1) apart from this specific statutory exception.

[3] At the time of writing, Ontario law also excludes protection for those who are 65 and older, *Human Rights Code*, R.S.O. c.29, s.10(1), but in December, 2005 the Ontario legislature amended the *Code* to remove this age restriction and this amendment comes into force on December 12, 2006. Newfoundland was also a member of this remnant class until May, 2006, when the limitation on protection against discrimination in employment for those 65 and older was removed by the Newfoundland legislature. See: http://www.releases.gov.nl.ca/releases/2006/just/0519n04.htm.

[4] On March 23, 2006, Notice of Motion was given in the British Columbia Legislative Assembly to require the government to introduce legislation to end the practice of mandatory retirement. All who spoke to the motion spoke in its favour. *Official Report of the Legislative Assembly (B.C.)* Second Session, 28th Parliament (Vol. 8, No.3) 3280.

[5] For example, in Manitoba, mandatory retirement in universities is permitted. See, *The University of Manitoba Act*, C.C.S.M. c. U60, s. 61.1 which provides that "the university and a union … may enter into a collective agreement that imposes … a mandatory retirement age of 65 years …" The University of Manitoba board can impose the same retirement rules on those not covered by the collective agreement. When the collective agreement or board by-law imposes this it will be considered a bona fide and reasonable employment and occupational requirement. Parallel provisions are found in legislation governing the operation of the University of Winnipeg and Brandon University. Under federal human rights legislation, as well as that of Nova Scotia, the restriction on mandatory retirement is that it cannot be imposed if there is no general plan under which all employees in a similar situation are treated equally. In New Brunswick employers can have retirement plans that encourage employees to retire but plans that require retirement can be subject to a human rights complaint and can only be justified if age can be shown to be akin to a *bona fide* job requirement. The New Brunswick Human Rights Commission has recommended that this very limited protection for retirement plans be removed from the legislation.

[6] *Louise Carlson v. City of Saskatoon Library Board and CUPE*. At the time of writing, counsel for opposing parties are preparing further written submissions and a decision from the Human Rights Tribunal is not expected until Fall 2006.

[7] In particular, see the Canadian Charter of Rights and Freedoms, being Part 1 of the *Constitution Act, 1982.* The Charter of Rights equality guarantee states in s. 15(1): "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on … age…."

[8] Perhaps most famously this proposition was established in *Vriend v. Alberta,* [1998] 1 S.C.R. 493, a case in which a majority of the Court held that protection against discrimination based on sexual orientation should be read into, or be deemed to be included in, Alberta's human rights legislation.

[9] See, *Nova Scotia (Workers' Compensation Board) v. Martin*, [2002] 2 S.C.R. 504, in which the Court held that Nova Scotia's Workers' Compensation Appeals Tribunal had jurisdiction to declare that statutory exclusion of compensation for chronic pain was constitutionally invalid as violating the Charter guarantee of equality.

[10] [1990] 3 S.C.R. 229.

[11] The primary reason given by La Forest J., writing for the majority, for holding that the University's mandatory retirement policy did not violate the Constitution was that the Charter of Rights and Freedoms does not apply to private (or non-state) regulation and that, in Ontario, universities are private institutions, not state institutions. The basis for this surprising (one might say, mistaken) holding is that governments do not try to influence university decisions and, therefore, are not part of the government apparatus. This conflation, by La Forest J., of non-governmental institutions with institutions that are designed to act independently of governmental influence represents, perhaps, a blinkered view of public structures. This aspect of the *McKinney* decision will not bear on the *Carlson* case; her employer – a municipal library board – is required to act in accordance with the terms of the Charter.

[12] There is an explicit process by which claims, including the right to equal treatment, are to be judged against section 1. This process was developed in *R. v. Oakes*, [1986] 1 S.C.R. 103.

[13] On the contrary it is universities' practice of retaining large numbers of retired professors on "at will" teaching and research contracts (at minimal pay) that represents the most significant erosion of academic freedom. This cost of mandatory retirement is discussed in D. McGregor, "The Ass and the Grasshopper: Canadian Universities and Mandatory Retirement" in Gillin, MacGregor and Klassen, *supra* note 1, 21 at 36-38.

[14] *Supra* note 10 at 284, La Forest J. states: "Universities need to be on the cutting edge of new discoveries and ideas, and this requires a continuing infusion of new ideas." Superior courts judges, it seems, do not share the need for this infusion of new ideas. Under the Constitution they may hold office for ten years beyond the period that Professor McKinney was entitled to employment.

[15] *Supra* note 10 at 283, La Forest J. states: "Without mandatory retirement a stricter performance appraisal system might be required. It would … probably require an assessment by one's peers or by outside experts. It could not be unilaterally imposed by university administration because of the role of the faculty or faculty association in the governance of the university." One might ask: why stricter, what is unusual about peer assessment, and when did due process become an intolerable social cost?

[16] [1992] 2 S.C.R. 1103.

[17] It is arguable that the precedental value of a Supreme Court of Canada ruling on a Charter claim is weaker when it is based on the Court's assessment of current social conditions that justify a breach than when it is based on the legal interpretation of a substantive right. In other words, perhaps the Court's legal analysis should weigh more in subsequent cases than its social analysis.

[18] S.S. 1979, c.S-24.1, s.16(7).

[19] The burden on employers to demonstrate a connection between a job requirement and actual needs with respect to work performance is not easily met. See, *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [the *Meiorin* case], [1999] 3 S.C.R. 3.

[20] See, *Ontario Human Rights Commission v. Etobicoke*,[1982] 1 S.C.R. 202, *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, [1989] 2 S.C.R. 1297. Both these cases relate to mandatory provisions applied to firefighters.

[21] CBC News, "Indepth: Retiring Mandatory Retirement" available on the CBC website at: http://www.cbc.ca/news/background/retirement/mandatory_retirement.html.

[22] The position taken by academic defenders of mandatory retirement is examined in D. McGregor, *supra* note 13 at 21.

[23] "How to manage an ageing workforce" The Economist, vol. 378, no. 8465 (February 18-24, 2006) 11: "When Bismarck first introduced state pensions in the 1880s, they kicked in at the age of 70, about 20 years more than the typical life span. Nowadays state and company pension schemes kick in at or before 65, almost 20 years less."

[24] See, M. Gunderson, *Banning Mandatory Retirement: Throwing Out the Baby out With the Bath Water* (C.D. Howe Institute Backgrounder 79) (Toronto, C.D. Howe, 2004). He points out that abolishing mandatory retirement will lead to costly monitoring and evaluation, as well as the risk of unjust dismissal and age discrimination cases.

[25] See, J. Kesselman, *Mandatory Retirement and Older Workers: Encouraging Longer Working Lives* (C.D. Howe Institute Commentary 200) (Toronto, C.D. Howe, 2005). He notes that monitoring productivity is a concern for *all* workers and since older workers do not necessarily mean less productive workers there is no reason to believe that banning mandatory retirement will have adverse effects. He states: "In short, employees need effective processes to monitor productivity of workers at all ages, and little if anything additional would be needed for older workers in the absence of [mandatory retirement]. Despite the claims, there is no evidence of costly new monitoring processes in the Canadian jurisdiction that have banned [mandatory retirement]" (at 9).

[26] This theme of retirement as an escape from drudgery is expressed in a CAW advertisement in Briarpatch vol. 35, no. 3 (May, 2006) (back cover) which states: "… the prospect of a good retirement helps Canadians get through the daily grind of working life. We have the right to retire with dignity and security, and to enjoy the later years of our lives free from the need to work. Canada is a wealthy country, and we can afford adequate income support for all seniors."

[27] See, CUPE's website posting, "CUPE's response to

banning mandatory retirement" (at: http://www.cupe.ca/Pensions/earlyretirement.

[28] CUPE is right about the scale of pension deficit in Canada's private sector. See, "Pension deficits soared in 2005: study", The Globe and Mail, June 19, 2006, at B1. The study surveyed 145 Canadian companies with defined benefit plans and placed the unfounded liability under these plans at $25.6 billion in 2005. The study also states the deficit in 2003 was actually $17.1 billion.

[29] CUPE website, *supra* note 27.

[30] The Globe and Mail, June 2, 2006, at B1.

[31] See, N. Pupo and A. Duffy, "Locating 'Mandatory Retirement' in the Midst of Economic and Social Transformations" in Gillin, MacGregor and Klassen, *supra* note 1, 118 at 127-133.

[32] The labour shortage in Canada hardly needs demonstrating. See, eg., Certified General Accountants Association of Canada, "Growing Up: The Social and Economic Consequences of an Aging Population", at: http://www.cga-online.org/servlet/portal/serve/Library/Advocacy+and+Research/CGA-Canada+Key+Areas+of+Interest/Aging+Population/ca_rep_2005-01_growingUp_4.pdf =(at 69-84). See, also, Kesselman, *supra* note 25: "The young-worker argument is particularly archaic under contemporary labour market conditions, as well as those forecast in future years. The Canadian economy is entering an era of skill shortages and even shortages of workers with more limited skills. Training young workers and upgrading the skills of all employees *must be complemented by policies to encourage older people to contribute their abilities as long as* possible. (emphasis added) (at 7); Organization for Economic Co-operation and Development, *Aging and Employment Policies: Canada* (Paris, OECD Publishing, 2005); Statistics Canada, *The Canadian Labour Market at a Glance, 2005* (Catalogue no. 71 –222-XIE), especially, Section M: "The aging population and retirement".

[33] Policy Research Initiative, "Population Aging and Life-Course Flexibility: the Pivotal Role of Increased Choice in The Retirement Decision," at http://policyresearch.gc.ca/page.asp?pagenm=ekos_life-course (at 5).

[34] Statistics Canada, "The Changing Profile of Canada's Labour Force, at: www12.statcan.ca/English/census01/products/analytical/companion/paid/Canada.cfm (at 19).

[35] Certified General Accountants, *supra* note 32 at 29.

[36] *Ibid.* at 19.

[37] Policy Research Initiative, *supra* note 33 at 7.

[38] *Ibid. at 16.*

[39] Kesselman, *supra* note 25 at 16.

[40] Gunderson, *supra* note 24, at 3-4, lists the studies that show that legislative bans on mandatory retirement did not have a significant impact on retirement decisions of older workers. He goes on to say, however, that the impact of significantly delayed retirement might occur due to longer life expectancy, the growth of the knowledge economy, less impressive pension fund performances and the disincentive effect of defined contribution pensions.

[41] Kesselman, *supra* note 25 at 1.

[42] Gunderson, *supra* note 24 at 4.

[43] *Ibid.* at 3.

[44] On adopting flexible employment practices, see: Policy Research Initiative, *supra* note 33 at 25-35; Human Resources Development Canada, "Overview of the Aging Workforce Challenges: Recommendations" at: http://www.sdc.gc.ca/en/lp/spila/wlb/aw/10overview_recommendations.shtml; William Robson, "Aging Populations and the Workforce: Challenges for Employers" at: www.cdhowe.org/pdf/BNAC_aging_populations.pdf at 45-48.

[45] P. Berkowitz, "U of T agrees to end mandatory retirement", University Affairs, vol.46, no.5 (May 2005), 30.

[46] P. Russell, "Retiree centres – the innovative part of U of T's New Deal", University Affairs, vol. 46, no.5 (May, 2005), 38.

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